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In The

SUPREME COURT OF THE UNITED STATES

October Term 1966

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,
Petitioners,

v.

TRANSAMERICAN FREIGHT LINES, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

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In The

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No. ———

ARTHUR WILCOX, LESLIE GRIER, GEORGE PORTER, ABE SMITH, RUSSELL WATERS and OTIS DRUMMOND,
Petitioners,

v.

TRANSAMERICAN FREIGHT LINES, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals of the Sixth Circuit rendered in the above entitled cause.

OPINIONS BELOW

The opinion of the District Court, Southern District of Ohio, Western Division (App. 1a) has not been reported. The opinion of the United States Court of Appeals, Sixth Circuit (App. 7a) is reported in 371 F (2d) 403.

GROUNDS ON WHICH JURISDICTION INVOKED

(1) The date of the judgment sought to be reviewed and time of its entry was January 18, 1967.

(2) There has been no rehearing.

(3) The statutory provision conferring jurisdiction on this court to review the judgment is 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

May a Court, on the facts presented, grant a motion for summary judgment thereby depriving petitioners of a jury trial; specifically, may a court hold, as a matter of law, that Respondent, Transamerican Freight Lines, (a certificated common carrier of goods engaged in interstate commerce, the exclusive lessee of the vehicle involved in the accident, and subject to the leasing requirements of the Interstate Commerce Commission) is not responsible to Petitioners for injuries received as a result of the negligence of Respondent's employee?

The subsidiary questions thereto are:

(1) Do the Regulations of the Interstate Commerce Commission impose such liability on Respondent, lessee of the vehicle?

(2) Do important considerations of public policy dictate the imposition of such liability on Respondent?

(3) Do the decisions of the Ohio courts and common law rules of master and servant, when properly interpreted and applied, impose such liability (or, in the alternative, require a jury hearing)?

CONSTITUTIONAL PROVISIONS AND FEDERAL REGULATIONS INVOLVED

Constitution of the United States

AMENDMENT VII – Civil Trials

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Regulations Interstate Commerce Commission, 49 CFR, Chapter 1, Sub Ch. B, Part 207 set forth in the appendix: (App. 10a).

STATEMENT OF THE CASE

Actions in excess of $10,000.00 each, arising out of personal injuries to all six Petitioners, were filed in the Common Pleas Court of Hamilton County, Ohio, which were removed by Respondent to the Federal Court on the grounds of diversity of citizenship.

On April 20, 1961 all six Petitioners suffered serious injuries as a result of a collision between the car in which they were riding and a tractor driven by Harry Culyer, who was an employee of respondent, Transamerican Freight Lines, a certificated common carrier of goods in interstate commerce. The tractor, owned by Culyer, was under exclusive lease to Respondent. At the time of the accident, the tractor bore Respondent's name in bold lettering, Respondent's I.C.C. certificate number, and all other material identifying it as Respondent's equipment and under its operation. Respondent admits these facts.

Because all six cases involved identical facts and issues (aside from the injuries) they have been consolidated for the purposes of pre-trial, for Respondent's motion for summary judgment (on the grounds that Respondent

would not be legally responsible for the negligence of its employee, Culyer), for appeal, and in this proceeding. The District Court granted Respondent's motion, rendering final judgment for Respondent in all six cases, which was affirmed on appeal.

The facts upon which the Court acted are as follows:

The lease ("Agreement") from Culyer to Respondent (a copy thereof being part of the record) conformed to I.C.C. Regulations except that it could be cancelled by either party upon five day notice. (This is not germane to the issues in that there was no cancellation). The lease provided in substance that: (1) the tractor "shall be under *complete control*" of *Transamerican* (Respondent) and "subject to such use as it may desire to make of it"; (2) Culyer *"shall not in any way control the use or operation"* of the tractor; (3) nothing in the lease shall be "construed in any wise to limit the liability" of Respondent "to the public in connection with the use of the tractor"; (4) upon termination of the agreement, Culyer would remove all plates, signs, etc. of Respondent; (5) Culyer would, at all times, keep the equipment in good mechanical condition, order and repair.

A deposition of Harry Culyer reveals that:

(1) At the time of the accident, Culyer was employed exclusively by Respondent; he was not permitted to drive for any one else; he was wearing a uniform and chauffeur's cap with "Transamerican" on it.

(2) The tractor was "exclusively bound" to Respondent, never being used to pull any trailers except Transamerican's or by Culyer for any personal matters. Culyer was the owner-operator who always served as driver of the tractor.

(3) Transamerican's name and permit numbers were painted on the vehicle. (Pictures of the tractor are included in the record).

(4) When not in use on Transamerican's business, the tractor was always parked by Culyer (with Respondent's knowledge and consent) at Respondent's Cincinnati terminal. Culyer used his own automobile to drive to and from this terminal (never using the tractor).

(5) At every terminal the tractor was examined by Respondent and if it failed to pass inspection, it was not used until properly repaired.

(6) Culyer was subject to call at any time and at any hour and obliged to take any load when called by Respondent.

(7) On Thursday, April 19, 1961 Culyer, who had been on the road for some three weeks on Respondent's business, delivered a load (apparently originating in South Bend, Indiana) to Respondent's Dayton terminal.

(8) After waiting some hours to ascertain if Respondent had any further loads, he was eventually told by dispatcher to go home for the week-end.

(a) There were no facilities at the Dayton terminal for Culyer to stay there.

(b) The Dayton terminal was "out in the woods", with no bus service so that the tractor was the only means available to Culyer to find lodgings.

(c) Because Culyer had been on the road for three weeks, this was a week end, and the Cincinnati terminal was only about 50 miles from Dayton, Culyer, with Respondent's knowledge and permission, proceeded to drive the tractor toward the Cincinnati terminal. When the accident occurred he was on the regular and most direct route from Dayton to the Cincinnati terminal.

(d) Culyer had a dual purpose in mind: to drive the tractor to the Cincinnati terminal where he could more properly and economically "put normal

maintenance on the truck" ("to take care of the truck which [he] promised Transamerican he would do") and, after parking the tractor on Respondent's lot, to drive home in his own car to spend the week end with his family. Respondent knew that drivers like Culyer went to their home terminals for repair service and upkeep of vehicles.

(e) On the night in question and at the time of the accident, Culyer was subject to call by Respondent; he would have been required to take any load if called by Respondent; Respondent had Culyer's phone number so that the dispatcher would know where to call him.

(9) Culyer made an immediate report of the accident to Respondent and to Respondent's insurer; Respondent furnished Culyer with forms to report to the State of Ohio and assisted him in preparing the report.. (A copy of this accident report is also included in the record.)

REASONS FOR GRANTING WRIT

1. The Court of Appeals' decision (holding that the I.C.C. Regulations do not impose any duty on lessee of owner-operated vehicles differing from the ordinary master-servant rules) is in direct conflict with the decision of the Court of Appeals Third Circuit namely, *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F (2) 473 (CCA 3rd, 1961) which held that under these Regulations, the lessee is responsible for the operation of the vehicle so long as and whenever the vehicle bears lessee's decals.

2. The decision is directly in conflict with the Regulations of the Interstate Commerce Commission.

3. The Court of Appeals has decided this important question of federal law (the effect of the leasing provisions

of the Interstate Commerce Act) which question has not been, but should be settled by this court.

(a) Considering the ever increasing volume of vehicular traffic and danger of injury to the public, involving serious economic loss to the injured persons, the question of the responsibility to the public for injuries negligently caused by franchised carriers is a matter of great public concern. Therefore, this Court should decide and put to rest the question of the effect of the Regulations so that, if necessary, corrective amendments may be made or so that these Regulations are uniformly applied and interpreted wherever suit may be brought. The rights of the public under the I.C.C. Regulations should not be left to speculation and chance (in which District the injured person sues).

A. The I.C.C. Regulations Impose Liability on Respondent.

The lower courts' holding distorts the apparently obvious definitions, meaning and interpretation of the words used in the Regulations.

(1) The Regulations expressly required Respondent to have had *exclusive* possession, control, and use of the leased quipment at all times. (§ 207.4 (a) (4)) If, at the time of the accident, Culyer could be said legally to have "possession", it follows ineluctably that Respondent's possession could not possibly be "exclusive". If Culyer had "control", then Respondent's control was non-exclusive. If Culyer had the "use" of the equipment, such could not possibly be consistent with Respondent's "exclusive use". If the Regulations are to be applied and the language thereof

given its universally accepted meaning, it is impossible to sanction or to give any legal effect to any attempted surrender or transfer of possession (except, as provided in the Regulations, to another authorized carrier) during the term of the lease.

(2) The Regulations specifically required Respondent to "assume *complete* responsibility" for the control and use of the vehicle. (§ 207.4 (a) (4)) How can these words be interpreted to enable Respondent to disclaim such "complete" responsibility. Any break in the chain of "responsibility" would necessarily make it "incomplete" — a direct contradiction of what the Regulations say.

(3) The Regulations (§ 207.4 (a) (4) (i)) permit of *only two exceptions* to such complete and exclusive possession, control, use, and responsibility: (a) by sublease to another *authorized carrier* and (b) *carriers* of *household goods* are required to have such *exclusive use "only when the equipment is operated for the authorized carrier"*. (207.4 (a) (4) (ii))

Hence, based on any logical approach and following the maxim "expressio unius, exclusio alterius", the only reasonable conclusion is that a surrender or transfer of possession, control or use is permissible in these two cases only and forbidden in all other cases. The fact that the exception permits carriers of household goods to limit their responsibility to the times "when the equipment is operated for the authorized carrier" carries with it a clear implication that all other carriers, such as Respondent, must assume complete responsibility for the use of the equipment at all times, irrespective of the purpose of the use or by whom it is used.

(4) Respondent was required to identify its equipment and a copy of the lease (or, in lieu thereof, a statement) must be carried on the vehicle at all times. (§ 207.4 (a) (7) § 207.4 (d)) The statement must certify that *the equipment is being operated by the carrier*. (§ 207.4 (d) (2)) What purpose is to be served by such requirements if the carriers may dispute the truth of such certification. The vehicle carries the flag of the lessee, the lessee *certifies* to the world that whenever the equipment is being used with its consent, the carrier is the one operating the equipment. Is the certification to be a meaningless gesture of no legal effect?

(5) Before possession, control, use, or complete responsibility is relinquished by the lessee-carrier, it must remove all identification showing it as the operating carrier (§ 207.4 (d)) and get a receipt (§ 207.4 (b)). The lower courts ignored these requirements and held that a failure to comply therewith entails no legal consequences.

A review of the history of the leasing Regulation may illustrate even more forcefully the basic fallacies of the lower courts' decision.

Prior to 1952, trip leasing of these owner-operated vehicles was permissible. The carrier was required to have possession *only during the period the equipment was operated in its service.*

This gave rise to such decisions as *Costello* v. *Smith,* 179 F (2d) 715 (1950 CCA 2) (involving the "empty" return trip) which was followed in Ohio in the case of *Simon* v. *McCullough,* 155 Ohio St. 104, 98 NE 19 (1951). Those decisions (favoring the carrier) were predicated upon the

absence of any clear regulatory action by the Commission which would impose liability on the carrier *"after the lease was ended"*.

Even in this pre-1952 era, there existed a "judicial antipathy toward the *Costello* decision" (a judicial cognizance of the basic unfairness in allowing the trucking company to escape liability and thereby deprive the injured person of any adequate remedy). 43 *Iowa L.R.* 545. A number of courts, despite the absence of any clear legislative expression, held the carrier liable on the return voyage despite the one way lease.

Hodges v. *Johnson*, 52 F. Supp. 488 (DC WVa 1943)

Leota v. *Plesinger*, 8 NY (2d) 449, 171 NE (2d) 454 (1960)

The I.C.C. took cognizance of the problems or "evils" created by the trip leasing among which were the following:

(1) The owner-operators, after completion of the trip, were on their own and the carrier assumed no responsibility for returning them to their homes.

(2) The operator would come into and out of regulated transportation depending on the desires of the authorized carrier.

(3) The owner-operator, being an independent contractor, was not under full control of the carrier.

(4) *Since some* of the *owner-operators* (as in our case) *did not carry public liability insurance, protection for the public might be entirely lacking.*

See *American Trucking Association* v. *United States*, 101 F. Supp. 710, 726 (Alabama 1951)

Note 32

Eastern Motor Express v. *United States*, 103 F. Supp. 694, 698 (Indiana 1952)

To eliminate these "evils" the Commission adopted two corrective amendments to the Regulations.

(1) In 1951 (effective February 1, 1952) 30 day leases were required for these owner-operated vehicles.

(2) In 1956 (effective 1957) Section 207.4 (d) was amended by deleting the words "when such equipment is operated by or through the carrier" thus requiring the carrier's identification to be on the equipment at all times.

Despite these amendments, the District Court and the Court of Appeals have sanctioned the condemned practice of "leaving the owner-operator on his own with the carrier's assuming no responsibility for returning him to his home." The Court countenances Respondent's leaving Culyer stranded "out in the woods" in Dayton with no means of transportation (other than the tractor) and no facilities. The protection for the public, which was the Commission's concern, is entirely disregarded. The old days of "trip-leasing", with all its attendant evils, have, in effect, been restored. The lower courts would impose liability on the carrier only when the equipment is used in the carrier's business despite the Commission's deletion of such limitation from the Regulations. The logical result of the Court's ruling would be transportation's "coming into or out of regulated transportation at the desires of the carrier." If Respondent may, with impunity, let Culyer use the vehicle to go home, why logically, could not Respondent have let him use it to drive for some one else or have permitted use of the vehicle by any unauthorized carrier? The entire purpose of the Regulations would be circumvented.

Since 1952, with one or two minor exceptions (and then under factual situations quite at variance with the one herein involved), the Courts have held the lessee of such owner-operated vehicles liable whenever the vehicle was being used with the lessee's consent.

Mellon Nat'l. Bank & Trust Co., et al v. *Sophie Lines, Inc., et al,* 289 F (2d) 473 (CCA 3 1961)

Marriott et al v. *Nat'l. Mutual Casualty Co. et al,* 195 F (2d) 462 (CCA 10 1952)

Felbrandt v. *Able,* 79 NJS 308, 194 (2d) 491 (1963)

Duke v. *Thomas,* 343 SW (2d) 656 (MO 1961)

(To these cases can be added those, heretofore cited, which held the carrier liable prior to the Amendments).

Hence, the Sixth Circuit joins with the small minority. In doing so, the Court, by judicial fiat, superimposed on the Regulations its own concept of common law rules thereby either distorting or ignoring the express words used in the Regulations. The Court adopted a back door approach: would an owner be liable; if not, then neither would a lessee of such owner-operated vehicle. Aside from the Court's erroneous conclusion as to the owner's liability, this is an application of the Regulations based on visceral reactions rather than on a study and proper interpretation. The Regulations should be read and interpreted as to the responsibilities imposed on the *"lessee"* of the owner operated vehicle to which they specifically apply. The Commission has found a need to regulate as to the lessee. Whatever may be an owner's responsibility is entirely extraneous. Interpret and apply the Regulations according to the reasonable construction of the language used and to the situation to which they expressly apply, namely, the *lessee* of the owner-operated vehicle. Had the Commis-

sion intended to place such lessee in exactly the same category as the owner, it could easily have said so. Is it not significant that the reference to "owner" appears among the exceptions: the lessee may be considered as "owner" to relieve itself of this complete responsibility by leasing to another authorized carrier? Should it not, then be logically inferred that in all other cases the lessee of an owner-operated vehicle does not have the privilege of an "owner" to transfer possession, control, and responsibility.

The Court considered this case as if there were a "bailment" but failed to note that a bailment necessarily entails a delivery which excludes possession of the owner and gives the bailee sole custody and control over the article bailed.

7 *O. Jur.* (2d) *Bailments* § 3 p. 92

The Regulations proscribe such "excluding" of lessee's possession (it is the lessee and he alone who must have exclusive possession); they forbid lessee from giving such sole custody and control to another (the lessee must have *exclusive* custody and control). Hence, there can be no bailment (except to an authorized carrier) and the legal concepts based thereon are irrelevant. Because the driver, Culyer, could not possibly be a "bailee" under the Regulations, perforce he must have been a servant for whose negligence Respondent would be responsible.

Why should a Court find it repugnant or even unlikely that the Commission might have intended (as it certainly appears to be true) to impose a greater responsibility on a lessee? There is little likelihood that companies will permit their drivers to use company owned vehicles except on company business. Further, carriers will not leave their regular drivers stranded. They will supply them with

loads to get to their home terminals or provide facilities for lodging. The danger of use by financially irresponsible drivers exists in these owner-operator lease cases calling for special regulation.

The fact that the Commission does not require the lessor (owner-operator) to have insurance, is another facet which leads to the obvious conclusion that the Commission intended to fasten responsibility at all times on the carrier. We refer again to *Eastern Motor Express* v. *United States, supra.* Certainly, we must logically believe that a carrier's vehicles (leased or otherwise) should not be permitted to be operated on the highways by financially irresponsible persons who cause injury for which the injured person has merely an illusory remedy.

B. Public Policy.

The carrier has been afforded a special privilege from the government to lease a vehicle for operation under its franchise on the highways, subject to compliance with certain rules. The carrier should, then, owe to the public a correlative duty to comply with these rules and not to use such vehicles or to authorize use thereof unless it assumes full responsibility therefor. It seems contrary to sound public policy to permit the financially responsible (and insured) carrier to use the highways under a special franchise and yet be enabled to escape liability for such use on some legal technicality.

The "public policy" arguments may be set forth by quotations from several Ohio cases:

> "Any business organization which permits a commercial conveyance to ply the public highways prominently proclaiming its name owes a duty to the public to stand by that voluntary self-advertising proclamation."
>
> *McDougall* v. *Cartage Co.*, 169 Ohio St. 522, 527 160 N.E. (2d) 266, 270 (1959)

"The duties, purposes and obligations of motor freight companies . . . are quasi-public in nature and the operation of trucks and trailers on the public highways greatly increases the hazards of driving thereon by others entitled to use them."

Stickel v. *Erie Motor Transport Inc.*, 54 Ohio App. 74, 79, 6 NE (2d) 15, 17 (1966)

"Principles of law applicable thereto should expand to cover newly created and changing conditions and necessities. It would seem that public policy requires it and the general public affected by the increased hazards has a right to expect it . . ."

Stickel v. *Erie Motor Transport, Inc.*, 54 Ohio App. 74, 79, 6 NE (2d) 15, 17 (1936)

C. Misapplication of Ohio Law Pertaining to Agency.

In addition, the Courts below misapplied Ohio law. Whether Respondent's liability should be tested as if it were the owner of the vehicle and on common law principles, Respondent would still be liable (or, at least, the question of its responsibility must be submitted to the jury for its decision).

The Court failed to apply the doctrine of presumptions which automatically requires a jury trial wherein the burden is on the carrier to convince the jury (not the court) of its non-liability. The Court treated the case as if the driver were on some frolic of his own entirely divorced from the employer's business.

The Court's decision is directly contrary to the Ohio Supreme Court's rulings. The Ohio Supreme Court has declared, unequivocally, that the mere fact that the vehicle bears the distinctive marking and I.C.C. permits of a

company suffices to make out a prima facie case against the company.

McDougall v. *Cartage Co.*, 169 Ohio St. 522, 160 NE (2d) 266 (1959)

The Ohio Court cites with approval the case of *Fullerton* v. *Motor Express*, 375 Pa 173, 175, 100 A (2d) 73, 74 (1953) wherein it was stated:

> "The presence of a name on a commercial vehicle raises a rebuttable presumption that . . . the driver of the vehicle is a servant of defendant acting within the scope of his employment . . . *This presumption is self-sufficient to take the case to the jury even though the defendant produces uncontradicted evidence that the driver was not its employee.*" (Emphasis supplied)

Further the Court, in applying the master-servant rule, has brushed aside other rules enunciated by the Ohio Courts. (We might even add that it disregarded some of its prior decisions). The Court lost sight of the fact that it is the "*right* to control" which is decisive, not the mere exercise thereof.

Ross v. *Burgan*, 163 Ohio St. 211, 126 NE (2d) 592 (1955)

In *Allstate Ins. Co.* v. *Combs*, 2 Ohio App. (2d) 17, 206 NE (2d) 36, 37 (1964) the Court said:

> "The opinion of the Court [Ross v. Burgan] makes it clear that the *right to control* is determinative. Hence the fact that the owner did not direct or control the driver does not affect the agency relationship . . . .
> "Counsel . . . argues that there must be some business or commercial element involved . . . No where in the definitions of agency do we find such requirement."

See also *American Transit Lines* v. *Smith*, 246 F (2d) 86 (CCA 6 1957).

Aside from the Regulations, the lease definitely gives the right to control at all times to Respondent. The lease specifically recited that *Culyer "shall not* in any way *control* the *use or operation* of the tractor."

Hence, the Court erred in applying the Ohio common law principles of master and servant.

Further, the Court disregards the "return home" phase. The Respondent put this vehicle on the road. Certainly the parties contemplated that Culyer (the owner-operator of the vehicle) would return to Cincinnati and not be on the road interminably. Who, but Respondent, was responsible for the tractor's being on the highway at the time of the accident? By reason of Respondent's business Culyer was "stranded" in Dayton with no means of transportation or lodging except by use of the tractor. The use by Culyer of the tractor at the time of the accident directly arose out of Respondent's business and was incidental thereto. The trip from Dayton was a part and parcel of and directly related to the interstate carriage in which Culyer was engaged for Respondent. Culyer's driving the vehicle to Cincinnati to his home terminal was a use obvious to every one, to be contemplated and expected by the carrier as an almost certain denouement of his work. It was a mere "return trip" culminating a three week voyage on the road for Respondent. In this connection see:

Amstutz v. *Prudential*, 136 Ohio St. 404, 26 NE (2d) 206 (1940)

This is accentuated by the fact that Culyer intended to service the vehicle. This was for Respondent's benefit as well as Culyer's. In doing things incidental to repairing

or servicing a vehicle, the carrier is "as much engaged in the business of common carriage as when actually on specified routes."

Mitchell v. *Great Eastern Stages, Inc.*, 140 Ohio St. 137, 42 NE (2d) 771 (1942)

Where a servant combines his own business with that of the master, any benefit to the master, no matter how slight or indirect, will suffice to hold the master responsible.

Restatement, Agency § 236
United States v. *Webye*, 191 F (2d) 181 (CCA 9 1951)
Kaplan Trucking Co. v. *Lavine*, 253 F (2d) 254, 262 (CCA 6 1958)

The lower Court went off on a tangent by saying this was Culyer's responsibility as lessor (not as the operator) and hence, in this respect, he operated as independent contractor. This reasoning is entirely fallacious in that the carrier, as well as Culyer benefited; Culyer could never take or use the vehicle as an independent contractor. Based on the Regulations, and lease as well, the vehicle and use thereof remained in Respondent's possession and under its complete control so that, in performing an act beneficial to lessee as well as to himself, Culyer was operating the vehicle as a servant in furtherance of his master's business.

CONCLUSION

The lower courts ignored the Regulations of the Interstate Commerce Commission and expressly and anachronistically decided the case on "Hornbook Law" (See opinion District Court). Although the equities seemingly are

overwhelming in favor of Petitioners, the lower courts conceived of certain common-law master-servant rules as sacrosanct and controlling. It seemingly was inconceivable to them that any legislative body might, in the public interest, change the rules of the game. They failed to recall that master-servant law is not a static concept but had its origin in public policy and develops and expands in accordance with the equities and public welfare. They even failed to apply the law as developed by the Ohio courts.

All that the petitioners request is their constitutional right to a jury trial. The liability of carriers, operating under a public franchise, is a matter of great concern not only to these Petitioners but to the public at large to be assured that if the use of the highways by a franchised carrier's vehicles entails injury to a member of the public, he should, at the very least, be entitled to know that he has an action against some one financially responsible.

For the reasons heretofore set forth, the issues herein do involve serious, substantial, and important questions of Federal Law which should be decided by this court.

Respectfully submitted,

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